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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1013 - 1015

ROBERT R. HARE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

JOHN M. HARE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

CLINTON L. HARE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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PETITION FOR WRITS OF CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

SUMMARY STATEMENT OF MATTER INVOLVED.

The issues here involved relate to denial of motions for a directed verdict and to denial of motions for arrest of judgment.

Your petitioners, together with J. C. Perry and Company, an Indiana wholesale grocery corporation, of which they were the officers, and Russell P. Rozelle, a salesman, were charged in an indictment returned March 16, 1945, in the District Court of the United States for the Southern District of Indiana, before District Judge Robert C. Baltzell, with violations of the Emergency Price Control Act (56 U. S. C. A., App. Secs. 901-946) (R. 1-11).

The indictment was in six counts—five charging sale of liquor at wholesale in excess of ceiling prices, and one charging conspiracy so to sell.

Rozelle pleaded guilty. The other four defendants pleaded not guilty and went to trial before a jury (R, 15).

At the close of all evidence in the case separate and several motions were made for a directed verdict of not guilty (R. 147, 148). The trial court took these motions under advisement and the case went to the jury, which returned a verdict of not guilty for the corporation and guilty on all counts with respect to each individual defendant below (R. 148).

Your petitioners then seasonably filed separate and several motions in arrest of judgment (R. 149, 150).

The trial court passed on the motions for a directed verdict and those in arrest of judgment at the same time, overruling the same, to which rulings your petitioners, defendants below, separately and severally excepted (R. 151, 152).

Robert R. Hare was sentenced to a total of three years' imprisonment; John M. Hare to two years' imprisonment; Clinton L. Hare to a year and a day's imprisonment; and each was fined $25,000, being $10,000 on the conspiracy count and $3,000 on each of the other five counts, cumulatively (R. 152-155).

An appeal was taken to the Seventh Circuit Court of Appeals and the judgment below was affirmed on February 8, 1946 (R. 204, 205, 206).

Petition for rehearing was denied February 26, 1946 (R. 279). Mandate was stayed pending action on this petition.

Substantive Counts.

The first five counts of the indictment laid substantive offenses, all in the state of Indiana, specifying sale of a total of 241 cases of whiskey, on which the wholesale ceiling price was $7,417.54, for a total price of $11,641.00 (R. 1-5).

To support the charges of the first five counts, the government called eight witnesses. Five of these were purchasers of the liquor described in the first five counts of the indictment; one was the shipping clerk at J. C. Perry and Company; Rozelle, the salesman; and a man named Daniel W. Jones, who accompanied Rozelle during the transactions alleged.

It was admitted by defendants below during the trial that all whiskey entering into the case was the property of J. C. Perry and Company and was delivered by J. C. Perry and Company, a defendant, to the purchasers. Wholesale ceiling prices were admitted by stipulation (R. 20-22).

The same general pattern of testimony was adduced for all of the five substantive counts (R. 23-31). This was to the following effect:

That Rozelle, calling upon his trade in the state of Indiana and accompanied by Jones, indicated to customers that he could procure whiskey but that it would cost more than the ceiling price. An arrangement was made whereby the whiskey would be cleared through J. C. Perry and Company, which would invoice the same, deliver it and receive therefor the ceiling price. The money over and above the ceiling price was required to be paid to Jones, who accompanied Rozelle as the ostensible owner of the whiskey. All transactions involved were between Rozelle, Jones and the five purchasers.

The only testimony connecting defendants other than the company and the salesman, Rozelle, with these transtions was given by Rozelle, and since this testimony provides the gravamen of the petitioners' case, it is here repeated in some detail.

(1) The trial court asked witness Rozelle what he did with the excess that was collected on the "sales in the state of Indiana" (R. 76). No immediate answer was made by witness to the court's inquiry (see balance R. 76), but witness later, however, testified (R. 77) that the over ceiling portion of the money collected on "the Indiana sales" was taken down to J. C. Perry and Company in Indianapolis, where "Mr. Hare" (referring to petitioner, Robert R. Hare) told Rozelle to handle it, and he, Rozelle, put it in envelopes and handed it to the cashier to put in the vault. When he got ready he (meaning Rozelle) would cut it up or pay off (R. 77).

Referring to payment of expenses and in explaining how this was done, witness stated (R. 77) that after "they" had paid for all the whiskey, merchandise and everything "they" would divide the profit, that he would go back to the cage and if there were $2,000 profit, he would cut each one, Robert, Clinton and John Hare, for $500 and keep $500 for himself.

(2) Rozelle testified (R. 82) that in the spring of 1944, John (referring to petitioner, John M. Hare) got some of the "Indiana" money, but witness doesn't know when.

(3) Rozelle testified (R. 82) on redirect examination that he did distribute some of the excess over ceiling prices collected on "the Indiana sales" and gave at different times a total of probably $2,500 to John, Clinton and Robert Hare "from the Indiana sales of the 1,500 cases." This was $2,500 apiece.

The first point of confusion enters the case when the phrase "Indiana sales" is used without relating the same

to those Indiana sales which were the subject matter of the first five counts.

To support the first five counts of the indictment, involving, as aforesaid, a total of 241 cases, the five purchasers testified to the purchase of a total of 420 cases, of which 75 cases was whiskey of a description different from that alleged in the count concerned (R. 23-31).

Even including these 75 cases in the testimony supporting the first five counts of the indictment, the total price testified to for the 420 cases amounted to $20,053.00, on which a ceiling of $12,897.09 applied (R. 23-31).

Two Indiana transactions were introduced which had no relation to the first five counts of the indictment, but supported, as overt acts, the conspiracy count. These two Indiana transactions amounted to 732 cases of whiskey, with a total price alleged to have been paid in the sum of $35,336.00 for whiskey on which a ceiling of $21,634.00 was in effect (R. 31-35).

Thus, when "Indiana sales" were referred to, the term encompassed transactions totaling about 1,150 cases of whiskey sold, according to the testimony of the purchasers, for $55,389.00 when the ceiling was $34,531.09 (R. 23-35). The amount over ceiling was $20,857.91.

Had a less general and more specific definition been used in the testimony, namely "sales under the first five counts of the indictment" (which were "Indiana sales," it is true, but barely a third of all "Indiana sales" in dollar volume) such a term would have encompassed sale of not more than 420 cases of whiskey for a total of $20,053.00, with a ceiling of $12,987.09, leaving the amount over ceiling at $7,155.91 (R. 23-31).

The Conspiracy Count.

The conspiracy count charged that the five defendants aforesaid conspired within the Southern District of Indiana and within other judicial districts of the United States to

sell and supply distilled spirits at prices higher than the lawful ceiling, and alleged fifteen overt acts occurring in Ohio, Indiana and Kentucky (R. 6-10).

Seven of the fifteen overt acts (VII-XIII, R. 9, 10) concerned dealings with purchasers named in the first five counts, and five of the overt acts (IX-XIII, R. 9, 10) had reference to the identical whiskey sales alleged in the first five counts. The testimony supporting the conspiracy count came principally from Rozelle, who stated he made contact with one Frank Clark of Ohio, a representative of tavern keepers who had formed a pool of retail liquor dispensers for the purpose of procuring whiskey for sale at retail in the state of Ohio (R. 72). The Ohio liquor department permitted this method of procuring whiskey to be shipped into Ohio from other states, although Ohio maintained a monopoly on the handling of liquor (R. 68).

The members of the pool placed in the hands of Clark large sums of money to be used by him in locating and procuring whiskey for them (R. 72, 73). This was during 1943, when nothing appeared in the regulations making it unlawful to take commissions, finder's fees, etc., for services in locating and procuring whiskey.

Clark, after contacting Rozelle, made arrangements whereby J. C. Perry and Company during the year 1943 sold to the members of the pool whiskey which was delivered through the Ohio department. Funds which the members of the pool had placed with Clark paid for the whiskey. J. C. Perry and Company received the ceiling price and no more, and the whiskey was delivered by the company through the Ohio department.

In the transactions, Clark received from the tavern keepers a total of from $175,000 to $180,000 over and above the amount required to pay J. C. Perry and Company for the whiskey. Of this additional money, Clark gave Rozelle $168,000 and Rozelle, in turn, divided this money so that each of your three petitioners and Rozelle received $42,000 (R. 78, 79).

During these transactions, Rozelle testified, Robert Hare, Secretary of J. C. Perry and Company, accompanied him on the first visit to see Clark, at which time the arrangements for the sale were consummated (R. 72, 73). Clark testified that Robert Hare consulted with him concerning the transactions involved about three times (R. 63).

Testimony was also introduced to the effect that Robert Hare, as Secretary of J. C. Perry and Company, by letter dated May 12, 1943, but not written and mailed until September, 1943, appointed Clark agent for J. C. Perry and Company in Ohio (R. 64, 67).

Rozelle testified further, supported by his wife, that John Hare one night took a package containing $92,500 wrapped in paper, which Rozelle said represented proceeds from Ohio transactions delivered to him by Clark, and kept it over night, returning the package to Rozelle the following morning (R. 73).

Robert R. Hare, John M. Hare and Clinton L. Hare, your petitioners, admitted on the stand that they received $42,000 from the proceeds of the Ohio transactions, in the belief that the same was finder's fees or commissions (R. 95, 102, 103, 110, 122).

The evidence in support of other phases of the conspiracy was as follows:

During the year 1943, a Mr. McBride living in Ohio went to Louisville, Kentucky, to procure whiskey (R. 42). A Mr. Potlitzer, who had been a representative of distillers and who had sold J. C. Perry and Company 100 barrels of bulk whiskey before the ceiling price was placed upon the same, knew that J. C. Perry and Company had decided to sell this whiskey (R. 36). Potlitzer and McBride met either directly or through others, and Potlitzer notified J. C. Perry and Company that if the company would send the warehouse receipts properly endorsed to Louisville, Kentucky, he had a purchaser for the 100 barrels of whiskey then owned by J. C. Perry and Company (R. 36). J. C. Perry and Company, through its manager, Robert Hare, endorsed

the certificates and sent them to Louisville, Kentucky, by Rozelle, where they were transferred to McBride (R. 75). J. C. Perry and Company received for this whiskey $5,904.73, which was the ceiling price. The evidence shows that McBride from time to time furnished his agents a total of $36,000 with which to procure whiskey, and the only whiskey which he received was the 100 barrels of bulk whiskey. The evidence shows that a number of people who engaged in the transaction received parts of the difference between the sale price of $5,904.73 which J. C. Perry and Company received and $36,000 which Mr. McBride gave to his agents. Rozelle testified he delivered $30,000 from this transaction to Mr. Robert Hare (R. 75, 76).

The government's case was predicated on the theory that in both the substantive counts and in the conspiracy, the company was primarily responsible. The case was tried on the theory that the company owned the whiskey (R. 71); that the company sold and supplied the whiskey (R. 71); that the proceeds alleged to be over ceiling charges were kept in the company's vault under the supervision of a company employee (R. 77); that the company appointed Clark as its agent (R. 55) in pursuance of a plan to dispose of whiskey, on which otherwise the company would take a loss, in the state of Ohio (R. 77).

On appeal, the government denied such was its theory, but one of the prime issues here is that, having proceeded upon a theory of trial focused on prime culpability of the company, that theory cannot by a mere disavowment be tossed into the discard upon review.

All three petitioners made joint and several motions for directed verdicts on all counts at the close of all the testimony (R. 147, 148). After the jury rendered a verdict of not guilty as to the corporate defendant, your petitioners made joint and several motions in arrest of judgment on all counts (R. 149, 150). The same were overruled, and the issues here are on the action by the Circuit Court of Appeals for the Seventh Circuit in affirming the action of the trial court in overruling the said motions.

THIS COURT HAS JURISDICTION.

(1) The decision of the Seventh Circuit Court of Appeals in sustaining the action of the trial judge in refusing to direct the jury to return a verdict of not guilty and in refusing to arrest judgment is apparently in conflict with applicable decisions of this court, as will be more definitely set forth hereinafter under reasons relied upon for allowance of the writ.

(2) The decision of the case by the Circuit Court of Appeals for the Seventh Circuit is also at variance with decisions of Circuit Courts of Appeals as specified hereinafter under reasons relied upon for allowance of the writ.

THE QUESTIONS PRESENTED.

The questions herein presented are:

(1) Whether, in the absence of a substantial showing by the government of the guilt of the defendants as charged and in accordance with the government's theory at trial, they are entitled to a directed verdict of not guilty and an arrest of judgment.

(2) Whether, when the conspiracy proven was not the conspiracy charged and presented at trial by the government, the trial court should have directed a verdict and arrested judgment.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

(1) The decision of the Circuit Court of Appeals is apparently in conflict with decisions of this court laid down in *Gunning* v. *Cooley*, 281 U. S. 90; and *Clyatt* v. *United States*, 197 U. S. 207.

Under these cases, petitioners aver, it appears that it was the duty of the trial court to direct a verdict of not guilty against the individual defendants as to the first 5 counts

when the government failed to submit proof of the following matters:

(a) Evidence placing ownership, sale and supply of the whiskey involved in your three petitioners;

(b) Evidence that, in the absence of the defendants at each and every sale, Rozelle was acting as agent for any of your petitioners;

(c) Evidence that any of the specific proceeds from any sale were received by any of your petitioners.

(2) For the above reasons, the decision of this case by the Circuit Court of Appeals as to the substantive counts is also at variance with the following decisions: *Hubby* v. *United States* (C. C. A. 5, 1945), 150 F. (2d) 165, 168; *Grantello* v. *United States* (C. C. A. 8, 1924), 3 F. (2d) 117, 118; *Paddock* v. *United States* (C. C. A. 9, 1935), 79 F. (2d) 872, 876; *Leslie* v. *United States* (C. C. A. 10, 1930), 43 F. (2d) 288, 290; *Towbin* v. *United States* (C. C. A. 10, 1938), 93 F. (2d) 861, 866.

(3) Since the evidence upon which the government based its case against these petitioners on the substantive counts was circumstantial, the decision of the case is in conflict with decisions of other Circuit Courts of Appeals prescribing it to be the duty of the trial court to instruct a jury to return verdicts for defendants unless, when there is circumstantial evidence, circumstances exclude every other hypothesis but guilt. *Nicola* v. *United States* (C. C. A. 3, 1934), 72 F. (2d) 780, 786; *Grantello* v. *United States* (C. C. A. 8, 1924), 3 F. (2d) 117, 118; *Paddock* v. *United States* (C. C. A. 9, 1935), 79 F. (2d) 872, 876.

(4) As the decision of the Circuit Court of Appeals related to the conspiracy count, it is apparently in conflict with the decision of the cases of *Terry* v. *United States* (C. C. A. 9, 1925), 7 F. (2d) 28, 30; *Ventimiglio* v. *United States* (C. C. A. 6, 1932), 61 F. (2d) 619, 620; *Vinciquerra*

v. *United States* and *Haning* v. *United States* (C. C. A. 8, 1927), 21 F. (2d) 508, 510.

Wherefore, your petitioners pray that writs of certiorari issue under the seal of this court directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Seventh Circuit had in the cases numbered and entitled of its docket, No. 8873, *The United States of America*, plaintiff-appellee vs. *Robert R. Hare*, defendant-appellant; No. 8874, *The United States of America*, plaintiff-appellee vs. *John M. Hare*, defendant-appellant; and No. 8875, *The United States of America*, plaintiff-appellee vs. *Clinton L. Hare*, defendant-appellant, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of the said United States Circuit Court of Appeals for the Seventh Circuit be reversed by the court, and for such further relief as to this court may seem proper.

Respectfully submitted,

Dated March 28, 1946.

ROBERT R. HARE,
JOHN M. HARE,
CLINTON L. HARE,
Petitioners,

By:
(Sgd.) DANIEL S. RING,
Daniel S. Ring,
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C. Leo DeOrsey,
Attorneys for Petitioners.

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THE UNITED STATES OF AMERICA,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

THE OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is not yet reported in the printed volumes, but is printed in full in the record (R. 198-203).

JURISDICTION.

The jurisdiction of this court is invoked under Section 240-(a) of the Judicial Code (28 U. S. C. 347). The Circuit Court of Appeals has in this case "decided a Federal question in a way probably in conflict with applicable decisions of this court" and in conflict with decisons of other Circuit Courts of Appeals on the same matter. (Supreme Court Rule 38 (5)(b).) Judgment was entered in this case by the United States Circuit Court of Appeals on February 8, 1946 (R. 204, 205, 206). Petition for rehearing was denied February 26, 1946 (R. 279).

STATEMENT OF THE CASE.

The sailent elements of the case are stated in the preceding petition (pp. 1-8) and are hereby adopted and made a part of this brief.

Petitioners aver that an inspection of the record (especially if the same is amplified by inclusion of the opening statement by the government, which is being sought currently by motion in this court) will reveal that the theory of the case in the court below was that the corporation, acting through its officers and agents, sold its whiskey in violation of price ceilings provided by law and that the criminal design in conspiracy centered about the corporation's desire to sell whiskey on which it would otherwise take a loss because of the imposition of ceilings at a level lower than cost of the same to the company; that your petitioners' parts in all of this, according to this theory, were no more than the parts played by representatives and officers of a corporation, and not as individuals.

The verdict of the jury in the conspiracy case, when connected with the evidence presented, is felt by your petitioners to demonstrate that the conspiracy proven was not the conspiracy alleged, but another conspiracy altogether, namely a conspiracy the prime movers of which were individuals using an innocent corporation as an instrument to effectuate a criminal design.

SPECIFICATION OF ERRORS.

(1) The United States Circuit Court of Appeals erred in affirming the action of the trial court in refusing to direct a verdict of not guilty.

(2) The Appellate Court further erred as to the substantive counts by considering testimony not relevant to the same in reaching a decision.

(3) The Appellate Court further erred in applying testimony applicable only to the conspiracy count to the substantive counts.

(4) The Appellate Court further erred in holding that the charges of the indictment were sustained by proof that the corporation was used as an innocent instrumentality by conspiring individuals, when the allegations of the indictment and the theory of the case were that the corporation, by the acts of its officers and agents, was by no means innocent, but actually a prime mover in the conspiracy.

(5) The Appellate Court erred in sustaining the lower court in overruling the motion in arrest of judgment after verdict of not guilty for the corporation.

ARGUMENT.

A.

It is the duty of a court to direct a verdict of not guilty in the absence of substantial proof of the guilt of the accused in accordance with the charges laid by the indictment and the theory of trial by the government.

(1) As to the Substantive Counts.

The indictment charged your three petitioners with guilt as principals in that they sold and supplied certain quantities of specified brands of whiskey to certain named purchasers at prices specified above the admitted lawful ceiling.

The proof showed that all whiskey supplied was owned by the corporate defendant and none of the same was owned by any of your petitioners. The proof failed to show that any of your petitioners were present at the date when the sales were solicited or consummated. The proof failed to show that any of your petitioners designated Rozelle, the salesman, as the agent of any one of them to effectuate such sales.

The government relied for conviction of your petitioners on the first five counts solely upon the evidence that they received proceeds from the sales. The evidence adduced to support this, was to the effect that your petitioners received approximately $2,500 apiece "from the Indian sales."

The evidence as to "Indiana sales" showed that a total of more than $55,000 was realized from the same and that, of this amount, approximately $20,800 was above the ceiling. Analysis of the testimony shows that of the $55,000 involved in "Indiana sales," only $20,053 related to the first five counts of the indictment, and that in so far as these were concerned the amount of over ceiling was $7,155.91.

At this point, because of the complexity of the record and the difficulty of segregating the matters involved in the first five counts from those matters involved in the overt acts under the conspiracy charge, four tables are presented, with reference to record pages included, to give this court at first hand a birdseye view:

(A) of the charges laid by the indictment in the five substantive counts.

(B) of the proof adduced by the government on those counts.

(C) of the Indiana transactions not relevant to the first five counts.

(D) a summary.

TABLE A.

CHARGES LAID BY THE INDICTMENT

Count	Description of Subject Matter	Total Price Alleged	Ceiling Price	Amount Over Ceiling
1	100 Cases Cummings Imperial Whiskey. Sold to Paul Johnson (R. 2)	$4,800.00	$3,094.00	$1,706.00
2	16 Cases Cummings Imperial Whiskey. Sold to Glen Beyers (R. 3)	791.00	495.04	295.96
3	50 Cases Cummings Imperial Whiskey. Sold to Olin Sasser (R. 4)	2,400.00	1,547.00	853.00
4	25 Cases Cummings Imperial Whiskey. Sold to L. C. Hendershot (R. 4, 5)	1,250.00	773.50	476.50
5	50 Cases Cummings Imperial Whiskey. Sold to Wm. Earl Toombs (R. 5)	2,400.00	1,508.00	892.00
	Totals	11,641.00	7,417.54	4,223.46

* Meets averment of indictment.

TABLE B.

PROOF ADDUCED BY GOVERNMENT

Description and Witness	Total Price	Ceiling	Amount Over Ceiling
Witness Paul Johnson (R. 23), purchaser, as to 100 Cases Cummings Imperial Whiskey	$4,800.00	$3,094.00	$1,706.00
Witness Glen Beyers, purchaser, as to *16 Cases Cummings Imperial Whiskey	768.00	495.04	272.96
As to 20 Cases C.I.W.	960.00	618.80	341.20
As to 25 Cases C.I.W. (R. 25, 26)	1,200.00	773.50	426.50
Witness Olin Sasser, purchaser, as to 50 Cases Cummings Imperial Whiskey (R. 27, 28)	2,400.00	1,547.00	853.00
Witness L. C. Hendershot, purchaser, as to *25 Cases C.I.W.	1,250.00	773.50	476.50
As to 50 Cases C.I.W. (R. 29)	2,500.00	1,547.00	953.00
Witness Wm. Earl Toombs, purchaser, as to 50 Cases C.I.W.	2,425,000	1,508.00	917.00
As to 75 Cases Capt. Jack (R. 30, 31)	3,750.00	2,540.25	1,209.75
Summary of Proof incl. all transactions re purchasers named in first 5 counts	20,053.00	12,897.09	7,155.91

TABLE C.

INDIANA TRANSACTIONS NOT COVERED BY FIRST FIVE COUNTS OF INDICTMENT.

Witness	Description of Subject Matter	Total	Ceiling	Amount Over Ceiling
W. Paul Keller (R. 31, 32)	200 Cases Cummings Imperial Whiskey @ $49 a case	$9,800.00	$6,032.00	$3,768.00
Harry Moore (R. 33, 34)	532 Cases Cummings Imperial Whiskey @ $48 a case	25,536.00	15,602.00*	9,934.00
Totals	(Indiana Transactions not related to first 5 counts)	35,336.00	21,634.00	13,702.00

* No direct testimony as to ceiling price.

Price for ceiling shown reached by subtracting what Moore said he paid above ceiling ($9,934, R. p. 34) from what he said 532 cases cost him all told ($25,536 being 532 cases @ $48 a case).

TABLE D.

SUMMARY OF TESTIMONY.

(As recited in Tables A, B and C.)

	Total	Ceiling	Amount Over Ceiling
Indiana Transactions Relating to First Five Counts	$20,053.00	$12,897.09	$ 7,155.91
Indiana Transactions Not Relating to First Five Counts	35,336.00	21,634.00	13,702.00
Totals	55,389.00	34,531.09	20,857.91

At the trial, defendants denied receiving any money from the Indiana sales represented by the first five counts of the indictment. No testimony was adduced limiting the distribution of proceeds from "the Indiana sales" to the Indiana sales involved in the first five counts of the indictment. When Rozelle testified that he gave $2,500 apiece to your petitioners from "Indiana sales", it is submitted that every cent of this money could be accounted for from Indiana transactions not related to the first five counts of the indictment.

Faced with the denial of receipt of any funds from such transactions and having as its witness the man who controlled such funds, there was a failure in rebuttal by the government to produce specific evidence of the distribution of the proceeds of the transactions involved in the first five counts of the indictment.

The failure of the government, when it had produced a witness with the most favorable opportunity of knowing the facts, to make more certain the testimony which initially was extremely vague with respect to the controlling element of its case, would seem, under established practice, in itself to create an inference unfavorable to the government.

The failure to make a distinction between "Indiana sales" in general, and those particular Indiana sales which formed the transactions laid by the first five counts of the indictment, first on the part of the prosecution as above outlined, and later on the part of the trial court, followed this case into the Circuit Court of Appeals, whose opinion states (R. 200):

> "As to the sales in Indiana, which were covered by the first five counts of the indictment, the sales price was $58,224.74, which was $20,944.27 in excess of the ceiling price."

But, in combing the record from end to end, it is submitted that there cannot be found a sales price for the subject matter referred to by the Circuit Court of Appeals of more than $20,053.00, which was $7,155.91 in excess of ceiling.

It is manifest that the Circuit Court of Appeals took into consideration not only the Indiana sales which were covered by the first five counts of the indictment, but also two additional sales which had no reference to the first five counts of the indictment, the total of which represented a sales price of $25,336 and an amount over ceiling of $13,702. (See tables C and D, p. 19.)

Thus, the general testimony of Rozelle, which the government failed to make more explicit, opened clearly the possibility that all of the money which he said he gave to your petitioners as a result of "the Indiana sales of 1,500 cases" (R. 82) came from sales not covered by the five substantive counts of the indictment (R. 1-5).

The detail by Rozelle, furthermore, of "the 1,500 cases" also clearly refers to transactions not covered by the first five counts of the indictment, in view of the fact that in so far as those counts were concerned, the charges laid by the indictment were limited to 241 cases, and the testimony by purchasers, which was the basic testimony as to sales, showed that the Indiana transactions involved in the first five counts totaled not more than 420 cases of whiskey, of which 75 cases did not meet the description of the whiskey in the indictment.

It is for this reason that your petitioners aver that the only testimony linking them to the first five counts of the indictment was not of the substantial character that would properly permit the case to go to the jury, since there was a definite failure to connect specifically any of the proceeds of the transactions involved to your petitioners and since that failure is tied to the hypothesis possible from the testimony that the funds alleged to have gone to them could have come from seperate and independent transactions.

Such action is here alleged by your petitioners to contravene the law as laid down by this court and several Circuit Courts of Appeals.

The rule was laid down by this court, speaking through Mr. Justice Brewer, in the case of *Clyatt* v. *United States*, 197 U. S. 207, that it is the imperative duty of a court to see that all elements of a crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. The case in which this rule was laid down involved an indictment charging the "return" of two negroes to peonage under Sections 1990 and 1526 of the Revised Statutes. In that case, the government failed to show that

the negroes had previously been in a condition of peonage. That failure was deemed fatal to the government's case by this court, for the reason that a return to peonage could not be effectuated without a definite showing of the pre-existing condition of peonage.

It is contended here that the same sort of a failure has occurred in the government's case, in that the only testimony aimed at connecting your petitioners with the transactions in the substantive counts of the indictment can just as readily lead to the conclusion that the transactions involved in such testimony were outside the first five counts of the indictment as within them, and, in that specification of the "1,500 cases" must inevitably lead to the inference that the same are not limited to the first five counts of the indictment.

The rule laid down in *Clyatt* v. *United States*, 197 U. S. 207, has been followed in *Gunning* v. *Cooley*, 281 U. S. 90; *Nicola* v. *United States* (C. C. A. 3, 1934), 72 F. (2d) 780, 786; and other cases hereinbefore set forth in the reasons relied on for allowance of this writ.

It is, therefore, argued here that if receipt of the proceeds of an illegal transaction is sufficient in and of itself to send an issue to the jury, certainly the receipt of funds from the particular transactions of each count, or at the very least from all of the transactions in a lump forming the basis of all five substantive counts, must be shown before the prosecution can be said successfully to have assumed its burden of advancing sufficient substantial evidence upon which a jury can act.

(2) As to the Conspiracy Count.

The indictment charged your three petitioners with guilt in that they conspired to sell and supply whiskey to purchasers at prices above the admitted lawful ceiling. During the trial the government elected a theory predicated upon the desire of the company to save itself from loss with re-

spect to certain whiskey which it found limited to a ceiling price which was less than cost to the company.

The overt acts alleged included the introduction of defendant, Robert R. Hare to Clark; the receipt by Rozelle from Clark of approximately $92,500 and delivery by Rozelle to John Hare of this sum; the appointment of Clark as an agent for J. C. Perry and Company; the division between your three petitioners and Rozelle of $140,000; Rozelle's meeting with one Potlitzer; Robert R. Hare's payment of commission in the sum of $1,240 to Potlitzer; and seven sales of whiskey all occurring in Indiana, five of which were to the purchasers named in the first five counts of the indictment and two of which were to persons not named in the first five counts of the indictment.

To sustain its burden of proof under the indictment, the government offered the following testimony:

Rozelle testified that some time in March, 1943, Robert R. Hare, your petitioner, called the witness to his desk and said:

> "We have been caught with several hundred barrels of whiskey. We have paid far beyond the ceiling price. They've slapped a ceiling on that and we cannot sell it in this state or sell it anyway. It don't look right. I've heard talk about over in Ohio tavern people are crazy for whiskey. Do you know any way we can get rid of some of this whiskey?" (R. 72).

Rozelle testified he contacted Clark, whom he had seen previously buying whiskey in eastern Indiana. He asked Clark how much he would give for whiskey and Clark replied he had been paying better than $40. Witness asked if he would be willing to pay $35 and told Clark it was not his whiskey but he would go back and see Mr. Hare. He came back and told Mr. Hare and he said it was agreeable. He told Mr. Hare they could get $35 a case for all of it. Mr. Hare agreed, so that he went over, saw Clark, and he went ahead and tried to get the permit holders together (R. 72).

Robert Hare went with Rozelle, the latted testified, to see Clark, and met him at the Van Cleve Hotel in Dayton, Ohio, where Clark had some $20,000 to apply on the over the ceiling price (R. 72).

Clark testified as to the method whereby the sales would be effectuated that invoices were sent to the state of Ohio for $18 a case. He said he was paying $35 per case for the first order of 1,500 cases and $37 per case thereafter (R. 58).

Clark's testimony was to the effect that the five pools of tavern keepers paid through him $188,000 more than the ceiling price for whiskey of J. C. Perry and Company, for whom he was acting as agent (R. 64). This money was turned over to Rozelle and Robert Hare, and he received $8,900 for the transaction (R. 64). The money representing the over ceiling price was kept in a safe of J. C. Perry and Company (R. 81). Rozelle testified that the final division was made in February or March, 1944, although it could have been January 26, 1944. He got his share of the money after the matter was all straightened up with Clark in 1944 (R. 82). His part of the amount divided was a little less than $43,000, of which $12,000 was received in 1943 from Robert Hare (R. 87).

Respecting the Kentucky transaction, Rozelle testified that he received $30,000 over and above a ceiling price of $5,904.73 for warehouse receipts for 100 barrels of bulk whiskey, and turned it over to Robert Hare (R. 75, 76). Mr. Hare made no objections to witness' having received $30,000 above ceiling price for the whiskey (R. 77).

As to Indiana sales, Rozelle testified that, after "they" paid for all the whiskey, merchandise and everything "they" would divide the profit and if there was $2,000 profit, "he" would cut each one, Robert, Clinton and John Hare for $500 and keep $500 for himself (R. 77). He testified he gave at different times a total of $2,500 each to John, Clinton and Robert Hare "from the Indiana sales of the 1,500 cases" (R. 82, 83).

The overt act alleged with respect to the delivery of of $92,500 by Clark to Rozelle was established by Rozelle in his testimony. The overt act alleging "The defendant, Russell P. Rozelle delivered the sum of approximately $92,500 . . . to the defendant, John M. Hare" was sought to be supported by the following testimony (R. 73):

Rozelle testified that Clark had delivered to him $92,500 and that his wife was fearful of keeping so much money in the house; that he called Robert Hare but could not get him and then got John Hare. Asked what was said between him and John Hare, witness replied: "I don't know. I just told him this money, $92,000, my wife was afraid to keep in the house and wanted to know if he would keep it and he said he would." Witness did not know where John Hare kept the money but John Hare did give it back to witness the following morning and witness then gave it to Robert Hare (R. 73).

It is respectfully submitted for and in behalf of your petitioner Clinton L. Hare that not one single word of testimony was introduced to indicate that he had any knowledge as to what the alleged criminal design comprised, nor that he participated in the acts which produced the money. His conviction, it is submitted, is predicated wholly and solely upon the fact that he was given part of the proceeds.

As to your petitioner John M. Hare, it is submitted that no testimony was presented whereby it could be inferred he had any knowledge of or participated knowingly in any criminal design as alleged; that when he acted to keep the money given him by Rozelle over the weekend, the government's own witness did not know what he told John Hare, but informed him his wife was afraid to keep $92,000 in the house and wanted to know if he would keep it for him, and John said he would. Government witness admitted that the keeping was in the nature of a bailment for and in behalf of Rozelle and that John M. Hare returned the package containing the money to him, Rozelle, the next day. "John Hare simply throwed the bundle to witness" (Rozelle) (R.

73). This, and the admission by John M. Hare that he shared in the proceeds, is all of the testimony introduced to connect him with the conspiracy.

It is respectfully submitted that as to these two petitioners, with respect to the conspiracy count, the absence of substantial showing as to their agreement in any criminal design, or even their knowledge that a conspiracy was at work and the single fact that after the conspiracy had ended and the proceeds were to be distributed, they received part of the proceeds, was insufficient under the decisions of this court and of Circuit Courts of Appeals to warrant submission of the issues under this count as it affects these two petitioners to the jury.

In the case of *Pettibone* v. *United States*, 148 U. S. 203, this court laid down the rule that to constitute a criminal conspiracy there must be an agreement to do an unlawful act or to accomplish a lawful act in an unlawful way.

No evidence of an agreement on the part of John Hare or Clinton L. Hare to do any unlawful act was produced during the trial, and no participation in the alleged criminal design was shown in so far as these two petitioners were concerned until after the completion of the conspiracy and when the proceeds thereof, which had been kept in a common fund not under the control of either of your petitioners, were divided.

As to your petitioner Robert R. Hare, it is argued that the government laid its case as to conspiracy at the door of J. C. Perry and Company, and that his participation therein was sought to be shown by the government as being the participation of an officer and director of J. C. Perry and Company, the corporate defendant. The case was laid on the basis that his acts were the acts of the company; that the whiskey involved was whiskey belonging to the company; that all sales and deliveries made were made by the company through its officers and agents (Robert Hare, Rozelle and Clark); that the money from the over ceiling prices was kept in a company vault.

It is argued that the conspiracy proven, if any was proven, was a conspiracy limited to Rozelle, Clark and Robert Hare. It is submitted that the conspiracy proven was different from the conspiracy laid in the indictment in that the conspiracy laid necessarily involved two parties—one, the corporation, which was a necessary party as the owner and seller of the whiskey; the other, a party comprising several individuals who put into effect a scheme to sell the company's whiskey for the company at a ceiling price (which the company received) plus a premium in cash (which they received).

When the government failed to sustain its charge that the company, as a company, sold this whiskey for prices above the ceiling, the conspiracy that was alleged fell flat, and even though another conspiracy was proven, it was the duty of the court to direct a verdict of not guilty as to your petitioner Robert R. Hare.

On these facts it is held that the decision of the case is in conflict with the decision of the Sixth Circuit Court of Appeals in *Ventimiglio* v. *United States,* 61 F. (2d) 619, 620; the decision of the Ninth Circuit Court of Appeals in *Terry* v. *United States,* 7 F. (2d) 28, 30; and the decision of the Fifth Circuit Court of Appeals in *Hubby* v. *United States,* 150 F. (2d) 165, 168.

It is further submitted that in seeking to establish the true agency of Clark for J. C. Perry and Company, the government relied upon a letter written to Clark by Robert R. Hare as Secretary of the company, under the date of May 12, 1943. The proof showed that the letter was not received, nor was the authority it contained acted on by Clark, until September, 1943.

Four of the five transactions comprising the Ohio sales with respect to which this letter was written had been consummated at the time of its receipt, by the admission of Clark himself (R. 60). Clark listed the deliveries of whiskey involved in the Ohio transactions (R. 60) as follows:

(1) May 24, 1943	1,547	cases
(2) June 19, 1943	2,600	cases
(3) July 2, 1943	1,600	cases
(4) August 14, 1943	1,558	cases
Total	7,305	cases
(5) October 16, 1943	2,046	cases
Grand Total	9,351	cases

By Clark's own admission, this letter was not written primarily for the purpose of authorizing him to act as agent for the Perry company, but rather to furnish him with a basis for collecting money from his true principals whom he had been representing with respect to 7,305 cases of whiskey out of a total of the 9,351 cases which comprised the Ohio transactions (R. 64, 66, 67).

In this respect, also, a prime point in the government's theory that the company was the prime mover in this conspiracy was attempted to be made and failed, for when Clark was first called to the witness stand and asked about the letter of agency dated May 12, 1943, given him under the name of the Perry company by Robert R. Hare (R. 55), he was asked: "if he received it in the United States mails on or about the date which it bears."

The answer of the witness was: "On or about, I should say shortly after the date, it was sent special delivery."

Since the first delivery of whiskey, according to witness, was May 24, 1943 (R. 60) such testimony if established would have strongly shown that the company's own representative in Ohio was collecting for and in behalf of the company from tavern keepers in Ohio all of the ceiling and over ceiling prices for whiskey which formed the subject matter of the conspiracy count.

The government failed here through the lips of its own witness on cross-examination (R. 64), who stated: He "was already collecting the money for two of the pools when he

was asked to get a letter. The letter was to satisfy some members of the pool. He acted under the authority in the letter a couple of times."

And on re-cross-examination, this witness said (R. 67) he did not have the letter and could not act under it before September 22, 1943.

Yet this distinction was not recognized upon appeal, for in the opinion of the Circuit Court of Appeals on this case (R. 200) appears the following statement:

> "The government, on the other hand, produced evidence to the effect that Clark was an agent of the Perry company, as disclosed by a letter written by the Perry company delivered in September but dated in May of 1943, wherein it was stated that he was a salesman of the company. As such salesman he could not be the payor of a finder's fee to his principal."

Under this view of the agency of Clark, it was held that the funds which were divided could not have been finder's fees, since they came from an agent of the company, and it is submitted that although the government's theory was that Clark was an agent of the company and that the company was the prime mover in this conspiracy, it actually showed that the funds which Clark gave to Rozelle and which later were distributed to your petitioners by Rozelle were funds separate and apart from the sales price of the liquor (which went to the company) and were funds provided initially for and disbursed to an account other than purchase price.

The testimony as it stood created an anomalous condition in so far as the conspiracy was concerned, since during 4/5 of the Ohio transactions Clark was shown to have been purely and simply an agent for purchasers of whiskey, while for the last 1/5 it was sought to hold him to be an agent for the Perry company while masquerading under a letter of agency designed, at Clark's request, for some purpose other than true agency.

B.

"In order to sustain a conviction on circumstantial evidence, all the circumstances proved must be consistent with each other, consistent with the hypothesis that the accused is guilty, and at the same time inconsistent with the hypothesis that he is innocent and with every other rational hypothesis except that of guilt."

GENERAL STATEMENT OF PROPOSITION.

The proposition of law cited above was laid down in the case of *Leslie* v. *United States* (C. C. A. 10, 1930), 43 F. (2d) 288, 290, and represents that Court's summarization of the statement of general law in 16 C. J. 763. The Court in that case noted that cases were cited in support of this summarization from thirty-nine jurisdictions and that no contrary authority has been cited.

This was a case in which three judges of the Tenth Circuit agreed as to reversal in a case involving circumstantial evidence, but one of the judges indicated: "The jury should have been left free to decide the issue."

The majority of the Court, concurring in the result, laid down the law of the case on a very different basis in these words:

> "But we cannot agree . . . the jury should have been left free to decide the issue. If they (meaning the circumstances proved) are so inconsistent, the trial court should have directed a verdict."

The Court then cited the case of *Grantello* v. *United States* (C. C. A. 8, 1924), 3 F. (2d) 117, 118, and other cases from the Eighth Circuit, as well as voluminous cases from the First, Second, Third and Fourth Circuits and from the District of Columbia Circuit Court of Appeals.

After summarizing the ruling appearing above as cited in 16 C. J. 763, the Court said:

> "When the proof rests on circumstances which lead as rationally to the conclusion of innocence as of guilt,

there is no proof of guilt and nothing to go to the jury. Juries are not permitted to speculate in civil cases as to the negligence of the defendant; they should not be permitted to guess at the guilt of a defendant in a criminal case."

(1) Application of this Proposition to the Substantive Counts.

As to the substantive counts, none of your petitioners owned any of the whiskey mentioned in the first five counts of the indictment, and none of them was present at the time that the sales were solicited or made. None of them delivered the whiskey.

The circumstances which connected them with the first five counts of the indictment involved the purported division of proceeds of "the Indiana sales of 1,500 cases." But it was alleged that only 241 cases of whiskey were illegally sold in Indiana in the first five counts of the indictment, and proof supporting this encompassed no more than 420 cases.

The money that was alleged to have been divided among the defendants, and which they denied they received, could have come from Indiana sales that were outside the first five counts of the indictment. In fact, the inferences are very strong, in view of the fact that almost 2/3 of the money accruing on Indiana sales did come from sales outside of the first five counts of the indictment.

Accordingly, your petitioners represent to this court that in so far as the first five counts of the indictment are concerned, which alleged substantive violations, the circumstances proved should lead just as rationally to the conclusion of innocence as of guilt, and there was nothing to go to the jury.

(2) Application of Same Proposition to the Conspiracy Count.

With respect to your petitioners John M. Hare and Clinton L. Hare, in so far as the conspiracy count is concerned,

the same rule is urged as fully appilcable. The testimony connecting John M. Hare and Clinton L. Hare with the conspiracy was circumstantial.

In John Hare's case, the circumstances were the mere keeping of a package containing money overnight for an alleged conspirator who had confessed his guilt, and the acceptance of a division of the proceeds alleged to have been accumulated by the conspiracy after it was all over.

In Clinton Hare's case, his acceptance of such funds was the only connecting link between him and the alleged conspiracy.

Each of these men testified that before accepting the money, they inquired whether it was from a legal transaction and were informed that it was. This was not controverted.

It is submitted that the mere keeping of funds overnight under circumstances in which the government witness admitted he did not know what he told John Hare, other than that he had $92,000 that his wife was afraid to keep in the house, and the circumstance that men accepted proceeds of an alleged conspiracy in the uncontroverted belief that they were accepting what was legal and lawful, are totally insufficient to sustain the requirement that the government advance substantial proof of agreement, knowledge and participation in a conspiracy.

Furthermore, it cannot be argued that participation in an overt act, in and of itself, is sufficient to establish an agreement in the criminal design, or plan, an essential element in conspiracy.

It is fundamental that a conspiracy is made up of at least two parts—one, agreement of parties to participate in a criminal design, scheme or plot, whether the same be to do an unlawful act by lawful means or to perform a lawful act by unlawful means; and two, the overt act that must be proven in order to show that the conspiracy is at work.

The Circuit Court of Appeals for the Ninth Circuit, in *Terry* v. *United States*, 7 F. (2d) 28, 30, laid down the rule in 1925 that:

> "A conspiracy is not an omnibus charge under which you can prove anything and everything and convict of the sins of a lifetime."

The rule of law in this case was laid down with respect to the following instruction by the trial court:

> "If in this case, therefore, even though you may find there was no open or express declaration of purpose on the part of these defendants or other parties to unite in doing the acts charged, yet if you find that the acts of the parties were committed or accomplished in a manner or under circumstances which, by reason of their situation at the time and the conditions surrounding them, give rise to a reasonable and just inference that they were done as the result of a previous agreement, then you are justified in finding that a conspiracy existed between them to do those acts."

Citing the cases of *United States* v. *Lancaster*, 44 F. 896, 904; and *United States* v. *Richards*, 149 F. 443, 454, the Circuit Court of Appeals for the Ninth Circuit laid down this doctrine:

> "The rule is elementary and facts which merely give rise to a reasonable and just inference that a conspiracy existed does not necessarily exclude every other reasonable inference or hypothesis unless it can be said that only one just and reasonable inference may be drawn from a given state of facts."

Your petitioners submit that the proof of overt acts may, under some circumstances, be proof of an agreement in a criminal design which forms the basis for a conspiracy, but your petitioners here argue that unless the proof of such overt acts necessarily implies a meeting of minds and accord in the specific criminal design alleged, they then stand in the same position as any other evidence, and, therefore, come within the rule above enunciated.

C.

Proof of a conspiracy at variance with the charges laid in the indictment, as further refined and limited by the government's theory of case, will not sustain a verdict of guilty.

The charges that your petitioners were called upon to defend were not as broad as laid in the indictment, because the defendants were not required to meet charges other than those for which proof was introduced, and when an election was made by the government between one or more theories of case, the defendants were required only to meet that theory upon which the government proceeded.

Under this indictment, the government was at liberty to proceed to prove that each of the five defendants owned whiskey, that each of them sold whiskey at above ceiling prices, that each of them delivered whiskey at above ceiling prices, and that all of them joined in a conspiracy whereby the whiskey of any one or more of them would have been sold, supplied or delivered by any one of them above ceiling prices in any of the transactions specified as overt acts.

The government elected to proceed upon one particular theory, namely, that the whiskey was owned by the corporate defendant and that the corporate defendant, in order to save itself from loss, through its officers and agents set on foot a scheme whereby its whiskey would be sold at over ceiling prices and it would be saved from loss.

While the opening statement of the prosecution is not part of the record at this time (although a current motion to be presented with this petition and brief will seek to amplify the record in this respect) and, therefore, is not subject to inspection by this court in making a determination of this point, nevertheless, the evidence as presented by the prosecution and its plan of presentation clearly indicates that the theory elected to be followed in the conspiracy count as well as in the substantive counts was that the corporation, which owned the whiskey, sold the whiskey and sold it at above ceiling prices.

Your petitioners will not belabor this point with respect to the substantive counts, feeling that adequate representation heretofore has been made concerning the same; but with respect to the conspiracy count, your petitioners submit the following:

The prosecution stressed the fact that Robert R. Hare, as Secretary of the corporation, acted for the corporation in his meetings with Clark in Ohio and with others with respect to the disposition of certain bulk whiskey of the corporation. The prosecution stressed the fact that it was the corporation which owned, sold and delivered the whiskey, and the court instructed the jury (R. 140):

> "Even though you should find that Rozelle did not attend the first meeting at Dayton as an agent of the defendant corporation, it is an undisputed fact that Robert Hare, the Secretary of the corporation, was present, and you may believe from the evidence that he was representing the corporation. Keep in mind that this visit was the beginning of the transactions in Ohio."

The prosecution sought to show that the money divided among your three petitioners and Rozelle was a part of the sale price of whiskey and was, in fact, the money of the defendant corporation, and this fact was presented to the jury by the court in its instructions (R. 142).

Your petitioners, therefore, contend that the conspiracy charge that they were required to answer after the government's case had been put in was a conspiracy involving the corporation, through its Secretary, Robert Hare, on the one hand; and other individuals who sought to effectuate the corporation's plan of selling its whiskey at above ceiling prices, on the other hand.

It is submitted that the proof presented according to the theory adopted by the prosecution did not meet the requirements of substantiality warranting submission of the case to the jury, in that there was a complete failure by the government to show that the sales alleged to be made by

the company through its officers and agents were sales above ceiling, since all of the testimony was to the effect that the corporation received only the ceiling price for its liquor, and since the attempt to show that Clark was the agent for the company in this scheme failed, as indicated in detail on pages 28, 29 of this brief.

Since the conspiracy centered about whether the money other than that paid to the company as ceiling prices for liquor was also to be included in the sales price, and since the case was not presented on the theory that the corporation was an innocent instrumentality utilized by individuals, whereby they would violate the law, it is here argued that the proof of the conspiracy count as laid and limited by the government's presentation of its case utterly failed.

The Circuit Court of Appeals in its opinion (R. 203) accepted, however, a theory of case quite foreign from the one formulated by the prosecution in the lower court. It said:

> "The corporate entity sold liquor at ceiling prices, but appellants, by means of an exorbitant premium, collected independent of the ceiling price but in the negotiation of the ceiling price sale, turned the legitimate sale into an illegal one without benefit to the corporation or awareness on the part of its other stockholders or employees. The corporation was not the 'principal' in the crime. It was the medium manipulated by appellants to the end desired."

It is admitted that if the case had been presented on the theory that the conspiracy was one hatched by individuals who intended to use and did use a corporation as an unwitting instrumentality in the conspiratorial plan, this reasoning would be conclusive, but your petitioners argue it is erroneous when the record manifestly shows that the conspiracy charged and sought to be proven was an utterly different one.

When the jury returned a verdict of not guilty for the corporation, the only means whereby your petitioners could assert their rights was by motion in arrest of judgment

because of the verdict on the face of the record. It is contended that in overruling this motion, the trial court erred, and that the Circuit Court of Appeals erred in sustaining such action by the trial court.

CONCLUSION.

In conclusion, it is respectfully represented to this court that well-established rules of law laid down by this court and by other Circuit Courts of Appeals have not been followed in this case, which has resulted in the imposition of fines and sentences of imprisonment upon your petitioners.

It is respectfully requested that, in consideration of the petition and this supporting brief, it be borne in mind that the same are predicated on separate and several appeals by your petitioners, and to the extent that the facts of the case develop as to the individuals, consideration is requested to be given to the status of each individual's case as the facts and law may justify.

Respectfully submitted,

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(Sgd.) C. LEO DEORSEY,
Attorneys for Defendants-Appellants.

Supreme Court, U.
FILED
APR 5 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

Nos. 1013, 1014, 1015.

ROBERT R. HARE, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

JOHN M. HARE, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

CLINTON L. HARE, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

SUGGESTION OF A DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI.

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SUGGESTION OF A DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners in the above-entitled causes suggest to this court that in the above causes which are pending in this court on petition for writs of certiorari, the transcript of record duly certified and filed herein on the 28th day of March, 1946 is incomplete and that there is a diminution of

the record in said causes in that the subject matter hereinafter described, which should formally be made a part of the record in said causes, is not included in and made a part of the bill of exceptions in said printed transcript of record.

In support of the above suggestion and of the motion hereinafter made, your petitioners respectfully submit the following:

1. This suggestion and motion are made pursuant to Rule 17 of this Court.

2. The subject matter sought to be included in the bill of exceptions is set forth in Exhibit "A," appended hereto, which is prayed to be read and considered a part hereof.

3. Said Exhibit "A" appears in printed transcript of record heretofore filed in these causes (R. 209-214) but is not included in the bill of exceptions. It consists of the opening statement of the government in the trial of case below.

4. Pursuant to Rule 9, of the Rules of Practice and Procedure After Plea of Guilty, Verdict or Finding of Guilt, in Criminal Cases, adopted by this Court on May 7, 1934, effective September 1, 1934, your petitioners filed a motion in the appellate court seeking, inter alia, amplification of the bill of exceptions in these causes as set forth in Exhibit "A" aforesaid. Said motion was filed after decision of the case by the appellate court but while motion for rehearing was pending. (R. 207, 208) Said motion was denied (R. 280) at same time petition for rehearing was denied (R. 279).

5. The motion for amplification of the record, when filed below, was opposed by counsel for appellee below on the grounds that it was untimely and immaterial. (R. 244).

6. But counsel for appellee below did not dispute the correctness of said Exhibit "A" as being the opening statement of the government at the trial of the case. Counsel for appellee below, in fact, affirmatively set forth there

would have been no objection to the inclusion of the same in the bill of exceptions, as far as the government was concerned, had the same been offered seasonably at the time of the preparation of the bill of exceptions, although no useful purpose to be served by such inclusion was perceived. (R. 245).

7. Your petitioners now aver that in the appellate court the brief of the government was not received by counsel for appellants below until less than four days prior to the date set for oral argument and that it was not until that time petitioners were apprised of the position of the government as to its theory of case in the court below.

8. In the brief in the appellate court, in the oral argument there, and in the petition for rehearing, your petitioners consistently contended that the theory of case adopted and elected by the government resulted in proof of facts and circumstances at variance with the averments of the indictment as refined and limited by the government in its presentation of the case. Consequently, it was urged by petitioners in the appellate court that the case proved was not the case alleged and elected to be proven by the government. (R. 222, 223, 235, 236).

9. The same point is also here preserved for the consideration of this Court in the petition for writs of certiorari and brief supporting same. (Petition, Questions Presented (1) and (2), P. 7); Brief in support of petition, Specification of Error (4), P. 15; Argument, Point C., P. 34).

10. Your petitioners do not contend that the amplification of the bill of exceptions hereby sought, would, in and of itself, be exclusively determinative of the point raised; but your petitioners do represent that inclusion of the opening statement of the prosecution as sought would substantially aid and facilitate the consideration of the point involved when viewed in connection with matters already properly of record, namely, the charges of the indictment,

the evidence adduced at trial and the instructions of the trial court.

11. Your petitioners have sought to obtain certification of the subject matter of said Exhibit "A" as to its accuracy as reported in the stenographic record of the trial from the Clerk of the trial court, being the United States District Court for the Southern District of Indiana, but have been informed by said Clerk that such certification is not possible in the absence of statutory warrant.

Wherefore, your petitioners move that this Court issue its writ of certiorari, directed to the District Court of the United States for the Southern District of Indiana, commanding that court to certify and send to his court said part of the stenographic record in said court which is more particularly described as the opening statement for the government in the trial of the causes, as set forth in appended Exhibit "A."

Dated April 4, 1946.

Sgd. DANIEL S. RING,
Sgd. C. LEO DEORSEY,
Counsel for Petitioners.

DISTRICT OF COLUMBIA, ss:

We, Daniel S. Ring and C. Leo DeOrsey, counsel for Robert R. Hare, John M. Hare and Clinton L. Hare, petitioners in the above entitled causes, do solemnly swear that the facts recited in the foregoing suggestion and motion are true.

Sgd. DANIEL S. RING,
Sgd. C. LEO DEORSEY.

Subscribed and sworn to before me, John W. Crow, a notary public in and for the District of Columbia, this 4th day of April, 1946.

Sgd. JOHN W. CROW,
Notary Public, D. C.

(My commission expires June 14, 1949.)

(Notarial Seal.)

EXHIBIT A.

Mr. Pfister: May it please the Court, ladies and gentlemen of the Jury: To define to you a brief outline of this prosecution, in the indictment, one corporation, J. C. Perry & Company is named defendant, four individuals, Mr. Robert R. Hare, who was secretary of the corporation, John M. Hare, who was president of the corporation, and Clinton L. Hare, who was treasurer of the corporation, and Mr. Russell P. Rozelle, who was a salesman for the corporation.

The evidence will show, as the Court has indicated, that the J. C. Perry & Company have been engaged for many years in the sale of groceries and similar articles at wholesale. Their offices are in the city of Indianapolis, and in more recent years they became duly licensed and qualified to sell whiskey at wholesale.

This evidence, ladies and gentlemen, will show, I believe that in a number of instances Mr. Rozelle, who is referred to as the salesman, or the whiskey salesman, knowing that the corporation owned either warehouse receipts covering volume of cases of bottled whiskey or whiskey itself, went out in his terirtory, which, generally speaking, comprised five or six counties in the east central portion of our State; that he called on divers individuals who were engaged in operating taverns and restaurants, and that in substance he inquired of these different individuals—how is your whiskey stock—meaning, of course, how is your supply? That in some instances he found that these men who had been customers of his, some of them probably for several years and who had bought whiskey through him from J. C. Perry & Company, advised him in substance that they were either out or they were badly in need of whiskey.

The evidence will show that in some instances, in several instances Mr. Rozelle told these individuals in substance, "Well, I can let you have some whiskey, but you cannot get it at the ceiling price." And the evidence will show that the result of those transactions was the sale to the persons named in the indictment as were read over, those names a few moments ago, at Muncie, Anderson, Newcastle, the three that come to me just now, Connersville, the sale of whiskey by the case involving volumes ranging from five cases up to 100 cases.

The evidence will show, and I will read you in a few moments a stipulation to which the Court referred, that on all of that whiskey sold in Indiana in those counties most of it was what is known as Cummings Imperial Whiskey; that on the dates of the respective sales the lawful ceiling price which J. C. Perry & Company, or anyone else, for that matter, may have charged these people in Muncie, in Anderson, in Newcastle and in Connersville was for this Cummings Imperial Whiskey $30.94 a case.

Now there is another Cummings Whiskey that you will hear something about. As I understand, there is a difference in blend on which the ceiling was a little less. I will speak of it now as Cummings, the ceiling was $30.16 a case.

The evidence will show, ladies and gentlemen, in a number of instances J. C. Perry & Company, the corporation, through its salesmen and through its officers, sold to these divers persons divers quantities of cases of whiskey for $48.00 a case. In other words, the ceiling $30.94, I think the evidence will show in most instances they paid $48.00 a case or thereabouts, maybe $47.00.

J. C. Perry & Company, a corporation, dealt in what we commonly term whiskey warehouse receipts. That is they bought the original whiskey warehouse receipts held by some other firm or person which were properly endorsed, entitling them to have the whiskey which was in the warehouse, and I think this evidence will show that J. C. Perry & Company had purchased some warehouse receipts relating to 100 barrels of whiskey from a firm in Chicago, that among the representatives of that firm was one Mr. Mortimer Potlitzer. He is a resident, I believe, of Lafayette, Indiana and Louisville. Mr. Potlitzer sold the J. C. Perry Company for a number of years, they were a very good customer, and the evidence will show that the defendant, Robert R. Hare, the secretary of the corporation, communicated with Mr. Potlitzer and told him that he had a lot of whiskey, that is, I think the evidence will show that the corporation or the company had a lot of whiskey that they could not sell under the Indiana OPA ceiling price without taking a tremendous loss, and the evidence will show that Mr. Hare arranged with Mr. Potlitzer that if he could find a purchaser for these warehouse receipts or this 100 barrels of bulk whiskey, he would like to sell them, and I think the evidence will show that they had an understanding that he would get a commission.

Now there was something said awhile ago about finders fees that maybe some of the evidence may relate to, and Mr. Potlitzer went to Louisville, Kentucky. I believe the evidence will show J. C. Perry & Company had paid approximately $2.15 a gallon for this whiskey that I am speaking of now. Mr. Potlitzer went to Louisville. Down at Louisville he met a man by the name of Goltsman, I believe is the name, and through two or three different individuals finally he and Mr. Goltsman found a purchaser, a man by the name of C. J. McBride, from Canton, Ohio. I think McBride is here and will testify of the fact that he learned these receipts were available and that he came from Canton, Ohio to Louisville, Kentucky and met two or three individuals at the Kentucky Hotel in Louisville, and the evidence will show after Mr. Potlitzer and Mr. Goltsman had found this prospect for the sale of this whiskey Mr. Potlitzer called by telephone and talked with Mr. Robert R. Hare in Indianapolis and told them they had a buyer, and it was arranged that Mr. Russell P. Rozelle, the salesman, would immediately go to Louisville by train with these original warehouse receipts for sale. The evidence will show Mr. Rozelle did leave Indianapolis by train with these receipts on his person, that he arrived at the Kentucky Hotel in Louisville—this was about May 28, 1943—that he met Mr. McBride, he met a man named DeLucci, a man named—some other name,—and of course he met Mr. Potlitzer and Mr. Goltsman, and he was ushered to the Kentucky Hotel in Louisville where he met these other people, that they had a conference in the hotel room, he will testify to the fact that in the discussion of the quality of the whiskey and the quantity and the price that Mr. McBride, from Canon, Ohio, was told that this whiskey will cost you about $6.00 a gallon, $36,000; that they examined the warehouse receipts, found that J. C. Perry & Company either had not endorsed the receipts at all, or there is a requirement that when warehouse receipts are endorsed the signature of the endorser must be certified to by a bank. Mr. Rozelle immediately came back on the train to Indianapolis, and the next morning they went to the American National Bank where the endorsements were properly certified. Mr. Rozelle got right back on the train, or in some manner got right back to Louisville again. The evidence will show that those certificates were delivered over to Mr. McBride, and Mr. Rozelle accepted in the hotel room approximately $30,000.

And the evidence, I think, will show that whereas J. C. Perry & Company bought the whiskey for approximately $2.15 a gallon, they sold it for approximately $6.00 a gallon, which was well over the ceiling price, the ceiling price being $1.19 per gallon.

The evidence will further show that some time in May of 1943, or possibly prior to that month, Mr. Rozelle came in contact with a gentleman from Dayton, Ohio by the name of Frank J. Clark. Mr. Clark was the operator of a tavern and restaurant in Dayton for a number of years. I think Mr. Clark will say that he had some information that he might get some whiskey from the Perry Company and he contacted Mr. Rozelle, and Mr. Rozelle went over to Dayton, accompanied by the defendant, Robert R. Hare. The evidence will show that they conferred with Mr. Clark in Mr. Clark's hotel room in Dayton about purchasing some warehouse receipts or some whiskey for a given figure, that they agreed upon a price. This was case whiskey now, they agreed on a price which the evidence will show was substantially above the ceiling price; that Mr. Robert Hare, in Mr. Clark's hotel room, took the telephone and made a long distance call to Louisville, Kentucky, and arranged there for the bottling—it was bulk whiskey—for the bottling of this bulk whiskey; and the evidence will show that thereafter there were numerous instances or sales or transactions between the J. C. Perry Company, a corporation, its officers, or at least some of them, and Mr. Rozelle with Mr. Clark. The evidence will show that on the 25th of May, 1943, J. C. Perry & Company, the corporation, addressed a letter to Mr. Frank J. Clark in Dayton, Ohio, appointing him as their agent to sell whiskey in the State of Ohio on a commission basis and instructed him to get a rubber stamp and how it should be worded and how to use it, and that he should always, of course, when he marked a bill paid use the stamp and sign his name on it. That will be in evidence.

Now the evidence is going to show over a period of a matter of some months J. C. Perry & Company shipped to Ohio a large volume of case whiskey at substantially in excess of the ceiling price. They have a system in Ohio that is a little different than ours. They have a Liquor Control Board, and as I understand it, the person desiring to ship whiskey into Ohio, we will say, from Indianapolis must procure a consent from this Liquor Control Board before it can be labeled and shipped in there. There-

fore, the Liquor Control Board—that may not be its exact name, but that is what I mean, has a record of every shipment of whiskey into the State of Ohio from another State. Those records will be available here.

Now the sixth count of this indictment alleges that these same defendants, the corporation and their four individuals entered into a conspiracy to commit an offense against the United States, namely, to sell and supply distilled spirits to different named persons and others at a price in excess of the ceiling price. And I shall only mention and I will read the stipulation, and I think that will be all I do want to mention, that this evidence will show that when Mr. Rozelle went up, we will say to Muncie, to Anderson, Newcastle and Connersville and sold to these Indiana people at, we will say $48.00 a case, that wiskey was delivered usually on the same day. I think the evidence will show that the truck was right in Muncie loaded with the whiskey when Mr. Rozelle got there, or at least within a short time, that Mr. Rozelle would go to these people I have told you of in Muncie and these other towns I have referred to, and the evidence will show that he instructed these tavern owners to pay the J. C. Perry Company by check, and in some instances the driver of the truck drove up right at the moment or about that time and would deliver these 100 cases of whiskey to this man, Mr. Rozelle would often be accompanied by somebody else, and Mr. Rozelle would say, "Now you pay J. C. Perry & Company by check," and the purchaser, Mr. Johnson or whoever the purchaser was, was given an invoice of J. C. Perry & Company, invoice regularly printed which showed the sale on that day of a certain number of cases of whiskey at, we will say, $30.94 per case, which was the ceiling, and of course all you would do would be multiply that and the total would be correct.

The evidence will show that many invoices of that character were delivered to these purchasers either on the day of the sale itself or soon thereafter, and that in turn they paid J. C. Perry & Company the invoice price, which was the ceiling price, but the evidence will also show that Mr. Rozelle, as a salesman of this corporation, said, "Now you pay Perry & Company by check and give me the balance in cash," and the witnesses, I think, will tell you that they gave him substantial sums of money in cash and their records would show that they paid the corporation by check so it would show the ceiling price.

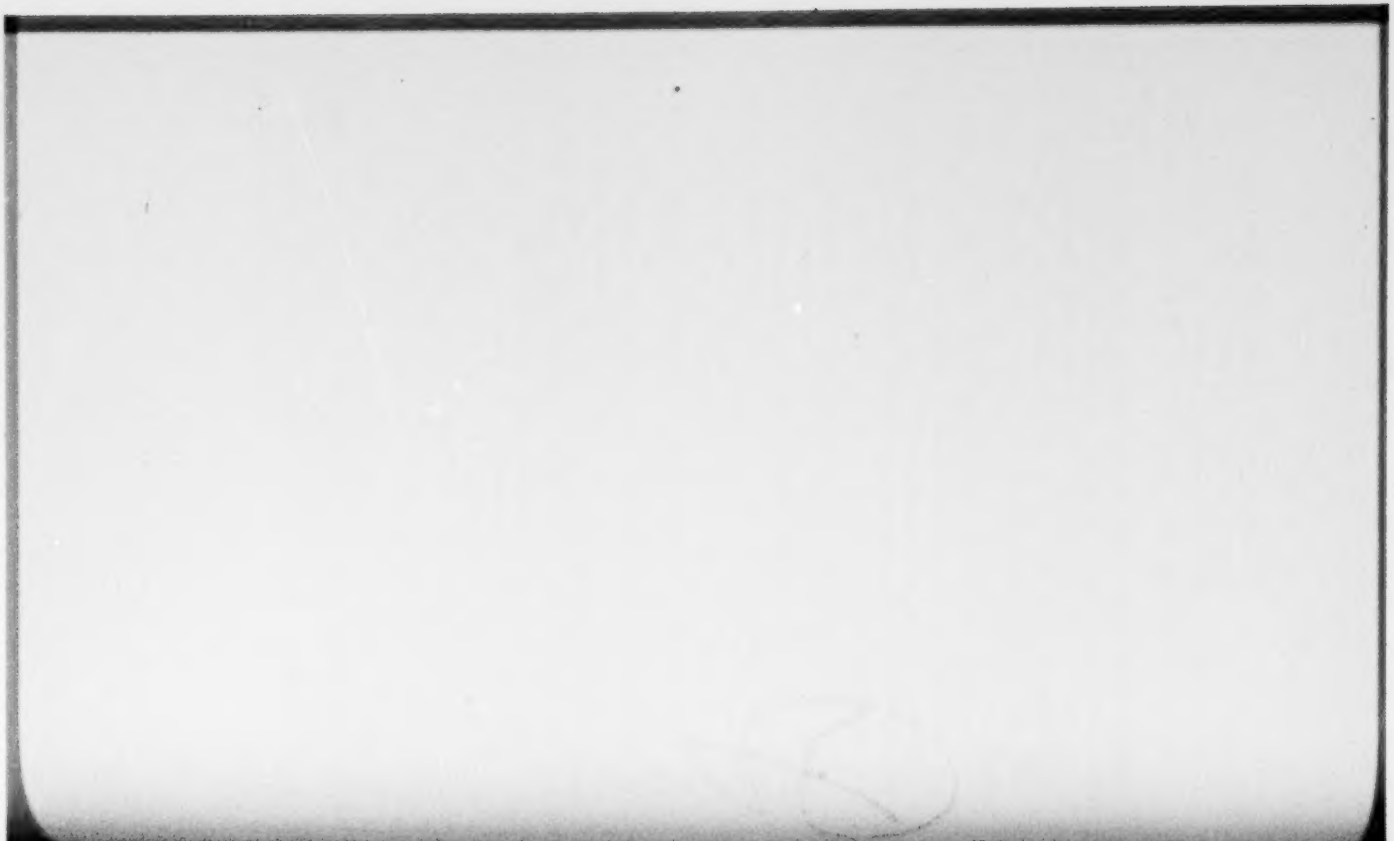
Substantially that is the Government's case.

As the court has told you, we have agreed upon certain formal facts that I won't take your time with, except I want to tell you in a few words. I am trying to do this by memory.

The evidence will further show that when Mr. Rozelle went around in his district here, his territory, and collected sums of cash, substantial sums in some instances, he came back to the office of the J. C. Perry Company right here in the city down here on South Capital Avenue, and I believe he would tell, for instance the cashier in the office, "Now you just put this away"—he would have the money in his sack or some sort of containers—"You just put this away in the vault." And I think the evidence will show that was done on different occasions, that the money Mr. Rozelle would bring in would be placed in the vault separate and apart from any of the company's other ready cash.

I want to mention there, too, that this evidence is going to show that in one instance this Mr. Frank J. Clark I have spoken about from Dayton, Ohio, by prearrangement with Mr. Rozelle, and after a shipment of whiskey had been sent to Ohio, came to Indianapolis from Dayton with approximately $92,500 in cash, that he brought it to the home of Mr. Rozelle here in the city, that Mrs. Rozelle—and she is here—would not permit him to keep that much money in the house overnight, and the evidence will show that Mr. Rozelle called Mr. Robert Hare, and I believe it will show that Mr. Hare possible was—well, he couldn't get him, and in his stead Mr. John M. Hare came to the Rozelle home in Indianapolis and took with him this $92,500.00, took it down to the office and put it in the vault. I am not certain it will show what he did with it. But the evidence will finally show that out of several meetings which these men had in the office of the corporation I think the evidence will show that at least $140,000 of money collected in excess of lawful ceiling price was divided four ways, Robert R. Hare, Clinton L. Hare, John M. Hare and Russell P. Rozelle.

We have stipulated, and the Court suggests that I read this now as I understand it.



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690597—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1013

ROBERT R. HARE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1014

JOHN M. HARE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1015

CLINTON L. HARE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 198–203) has not yet been reported.

JURISDICTION

The judgments of the circuit court of appeals were entered on February 8, 1946 (R. 204–206), and a petition for rehearing was denied on February 26, 1946 (R. 279). The petition for writs of certiorari was filed March 28, 1946. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support the verdicts.

2. Whether acquittal of the corporation of which petitioners were officers and directors requires reversal of petitioners' individual convictions.

STATEMENT

An indictment in six counts was returned in the United States District Court for the Southern District of Indiana against the three petitioners, J. C. Perry and Company, a corporation of which petitioners were officers and directors (R. 20), and one Rozelle (R. 1–10). The first five counts charged that the five named defendants sold specified quantities of whiskey in Indiana to certain named individuals at prices in excess of the maximum fixed by O. P. A. regulations (R. 1–5). The sixth count charged a conspiracy among the same defendants to violate maximum price regulations in the sale of liquor (R. 6–10).

Rozelle pleaded guilty and testified for the Government (R. 70). The corporation was acquitted and petitioners were convicted (R. 148). Fines totalling $25,000 were imposed against each of the petitioners. In addition, Robert Hare was sentenced to imprisonment for a total of three years, John Hare to two years, and Clinton Hare to one year and one day. (R. 151–155.) On appeal, the judgments were affirmed (R. 204–206).

The evidence for the government may be summarized as follows:

John Hare was president, Clinton (Larue) Hare, treasurer, and Robert Hare, secretary, of J. C. Perry and Company (R. 20, 96–97). Robert Hare was in active charge of the liquor department of the corporation (R. 109). Rozelle was employed by the company as a liquor salesman (R. 70).

In March of 1943, Robert Hare told Rozelle that the company had been "caught" with several hundred barrels of whiskey for which they had paid more than the ceiling price subsequently fixed on bulk whiskey. He asked Rozelle whether he could dispose of the liquor. (R. 72.) Rozelle spoke with Clark, who represented a group of tavern keepers in Ohio, and offered to sell him liquor at $35 a case. After a conference with Rozelle and Robert Hare, Clark purchased 1,500 cases at $35 per case (R. 53). The ceiling price of the liquor was $18.38 per case (R. 22, 58).

Subsequently, Clark purchased other liquor through Rozelle at $37 per case (R. 58). In all, the pool represented by Clark paid $342,922.16 for liquor, the ceiling price of which was $171,871.38 (R. 60, 63).[2] Payments on these transactions were in cash (R. 57, 58), or in part by check, to Rozelle, who would then cash the check and turn the money over to Robert Hare (R. 73). At one time, Rozelle received $92,500 in cash. Because his wife was afraid to keep that money in the house over night, he called Robert Hare, and when he could not reach Robert, John Hare. John kept the money, and the next morning gave it to Rozelle, who then turned it over to Robert. (R. 73, 83.)

One hundred and sixty-eight thousand dollars, representing net proceeds on the excess over ceiling prices in the sales to Clark, was divided equally among Rozelle and the three Hare brothers (R. 78–79, 84–85). The final division of the profits was made in January 1944 (R. 95), but the Hares did not disclose these sums in their estimated income tax returns until September 1, 1944 (R. 84), after an investigation had been started by government authorities (R. 77–78). John Hare asked Rozelle to account for the full

[2] Clark testified he purchased 9,351 cases (R. 60). The ceiling price was $18.38 per case (R. 22).

sum of $168,000, but Rozelle refused to do so (R. 86).

Rozelle also, through introductions effected by various persons, sold warehouse receipts for bulk liquor to one McBride for $36,000, of which he received $30,000 (R. 35–36, 38–39, 40, 75). He turned that money over to Robert Hare (R. 76). Perry and Company billed the purchaser at the ceiling price, approximately $6,000 (R. 45).

Seven Indiana liquor dealers testified that they purchased liquor through Rozelle at various times from January to March 1944 at prices substantially above ceiling, paying the ceiling price by check to J. C. Perry and Company, and the balance in cash to Rozelle or the man who accompanied him (R. 23–24, 25–26, 27–28, 29, 30, 31–32, 33–34). Sales to five of these witnesses were made the basis of the five substantive counts of the indictment (cf. R. 1–5 with R. 23–30).

Sales to all seven witnesses totaled approximately $20,000 over the ceiling price (see Pet. 18–19). Robert Hare told Rozelle to "handle" the cash, and Rozelle would place the money in envelopes to be put in the company vault (R. 77). Rozelle testified that out of this money there would be deducted various expenses, including the cost of warehouse receipts, since the whiskey "cost a lot more than shown on paper" (R. 76, 77). The

profits that remained were divided equally among Rozelle and the three Hares (R. 77). In all, each of the four received "a total of probably $2,500" from the "Indiana sales of the 1,500 cases" (R. 82–83). This was not part of the $42,000 received by each of the Hares on the sales to Clark (R. 83).

ARGUMENT

1. Petitioners challenge the sufficiency of the evidence, particularly as to Clinton and John Hare, on the ground that the only evidence of their participation in the conspiracy and the substantive charges was their receipt of one-fourth of the illegal profits (Pet. 9–10, 30–33).

As to Robert Hare, the evidence is clear that he was the directing voice in the general conspiracy. On the substantive counts there was evidence that he purchased the liquor for these sales above ceiling prices, that he knew of the delivery of this whiskey, and that he directed Rozelle as to disposition of the cash received (R. 48, 76–77).

The conviction of the other two brothers, it is true, rests largely on proof of the fact that they shared equally in the proceeds, although there is also evidence that John Hare kept $92,500 for Rozelle overnight, and that he took part in discussion at the time a ceiling price was first placed on bulk whiskey (R. 73, 109–110). It was, however, clearly in the

jury's province to infer that these two defendants, who stated that they took no active part in the liquor department of the company (R. 109, 122), were not given one-fourth of the proceeds, amounting to more than $42,000, without an agreement making them parties to the venture.

As to the substantive counts, petitioners assert (Pet. 9–10, 16–22) that the $2,500 each received could be accounted for from transactions with witnesses not mentioned in the first five counts of the indictment who testified to sales totalling more than $13,000 above ceiling prices. This argument, however, ignores that part of Rozelle's testimony in which he stated that certain expenses were deducted from the cash received for the excess over the ceiling price before there was a division of the profits (R. 76–77). Rozelle testified that $2,500 represented one-fourth of the net proceeds "from the Indiana sales of the 1,500 cases" (R. 83). Since the two witnesses not mentioned in the first five counts testified to sales of only 732 cases (R. 31–34; see Pet. 19), it is evident that the division of profits could not have related to those sales alone, but must have included the sales set forth in the substantive counts.

2. Petitioners also argue (Pet. 34–37) that, since the indictment named the corporation as

a defendant, and the Government sought to prove that petitioners were acting on behalf of the corporation which owned the liquor in making the illegal sales, the acquittal of the corporation necessitates reversal of their individual convictions. Petitioners admit that the indictment is in terms broad enough to cover activities by them individually (Pet. 34), but argue that the Government is bound by its theory that petitioners were acting on behalf of the corporation.[3] Petitioners themselves offered evidence to prove that the excess above ceiling price was not credited to the corporation (R. 113–114, 115, 122). In substance their argument is that because the Government thought they were acting for the corporation in making the sales, they must be acquitted on proof that they merely used the corporation as a means of making illegal sales for their own personal profit. Manifestly, however, the fact that one defendant is shown not to be guilty as charged does not necessitate acquittal of the others.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of

[3] In this connection, petitioners seek to amplify the record to include the opening statement by the assistant United States attorney. The statement has no significance beyond showing that the Government thought petitioners were acting not only for themselves but also for the corporation in making the illegal sales.

general importance. We therefore respectfully submit that the petition for writs of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

APRIL 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

Nos. 1013, 1014, 1015

FILED
APR 26 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

ROBERT R. HARE, *Petitioner,*

v.

UNITED STATES OF AMERICA.

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v.

UNITED STATES OF AMERICA.

CLINTON L. HARE, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR PETITIONERS.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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v.

UNITED STATES OF AMERICA.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR PETITIONERS.

GENERAL.

In its brief in opposition (pp. 1-6) the government raises no points of fact or procedure contravening the points presented by your petitioners in their petition and brief.

Although it is a more general presentation, the government's brief as to the opinion below, the jurisdiction of this Court, the questions presented and the statement, coincides, as far as it goes, with the presentation heretofore made by your petitioners.

As to the following details, however, now before this Court in the petition and brief supporting it, the government brief raises no points of controversy, and is silent concerning them:

(1) That the whiskey which was sold was not owned, sold or delivered by your petitioners (Pet. 3, 16).

(2) That the government sought and failed to show sales by an agent for the defendant company, one Frank J. Clark, as an essential element in its theory of case at trial (Pet. 27, 28, 29).

(3) That the Circuit Court of Appeals, in sustaining conviction on substantive counts, took into consideration facts not related to the substantive counts (Pet. 20).

(4) That the Circuit Court of Appeals, in ruling on the conspiracy count, erroneously relied upon and viewed as genuine the pseudo-agency of Clark in behalf of the defendant company as a basis for determining the guilt of your petitioners (Pet. 29).

(5) That the failure of the government to make more explicit the general testimony of its prime witness, Rozelle, after such testimony was flatly controverted by petitioners, created a presumption unfavorable to the government on trial (Pet. 20).

ARGUMENT.

The brief in opposition results in automatically presenting the argument in two main phases: (1) The case as to Robert R. Hare and (2) the case as to Clinton LaRue Hare and John M. Hare.

(1) Position of Petitioner Robert R. Hare.

Your petitioner, Robert R. Hare, with respect to the government's argument (Gov't. Br. 6-8) stands on the petition and supporting brief.

(2) Position of Petitioners Clinton LaRue Hare and John M. Hare.

As to your petitioner, Clinton LaRue Hare, the government relies wholly and solely for sustaining the verdict and judgment upon the fact that he received a share in the proceeds of the alleged illegal sales when a division of such proceeds was made, after all of the transactions were finished (Gov't. Br. 6, 7).

As to your petitioner, John M. Hare, the government relies upon the same fact regarding division of proceeds, but also remarks: "There is also evidence that John Hare kept $92,500 for Rozelle overnight and that he took part in discussion at the time a ceiling price was first placed on bulk whiskey." (Gov't. Br. 6)

Relying upon these premises, the government argues that it was "clearly in the jury's province to infer that these two defendants, who stated that they took no active part in the liquor department of the company, were not given one-fourth of the proceeds, amounting to more than $42,000, without an agreement making them parties to the venture." (Gov't. Br. 6, 7)

As to John Hare, all of the facts concerning the $92,500 have been recited in the brief of your petitioners (Pet. 25). There is one point contained therein, however, which it is now felt necessary to stress in behalf of John Hare.

The testimony of Rozelle with respect to the transaction involving the $92,500 contains what at first blush appears to be an insignificant fact, but which, upon analysis, rises staunchly and strongly to the defense of John Hare. Having recited that he had asked John Hare to keep a package containing $92,500 for him overnight, Rozelle stated that the next day "John Hare simply throwed the bundle to"

him (Pet. 27, R. 73). Rozelle then turned the package to Robert Hare (R. 73). Now, John Hare was Presi over of the company. He was Robert's brother. Rozelle vident company salesman. If John knew what was going on, was a leged; if he were one of the conspirators engaged as al- partnership with common design with Rozelle and R in a Hare, as alleged; if he knew how and where and in obert manner the proceeds of the venture were being ha what (as he should, if he were such a partner) and that R dled was ultimately to get the package (as Rozelle imp obert would he, John Hare, superior in company affairs to lied), Robert and Rozelle, after keeping the package fo both salesman overnight, have returned it to the salesma the given it directly to the one who ultimately, as allegan, or Rozelle, was to have its custody? ed by

Real truth is gleaned not from outstanding facts importance of which all appreciate, but from such s, the nificant facts as these, which appear as a useless det insig- first inspection, but which assume great proportions tail at determination of what is the truth, when analyzed. in the

Therefore, your petitioner, John M. Hare, here a that the only inference which can arise from this cir argues stance is that he took a package of money from Roz rcum- Rozelle's request, kept it as Rozelle requested over elle at and returned it to Rozelle the next morning. No inf night, here is possible in reason that, in so doing, John Har erence participating knowingly in a criminal design as a re was wilful conspirator, knowingly handling conspiratoria guilty, ject matter. al sub-

With respect to the matter cited by the governm its brief (page 6) concerning John Hare's "part i ent in cussion at the time a ceiling price was placed on bulk in dis- key (R. 109, 110)," your petitioner, John Hare, rel k whis- the record only (and incidentally upon the very sam lies on identical excerpt from the record that is cited by th ne and ernment). This reads as follows: he gov-

(John Hare testifying on direct examination at the trial (R. 109, 110)): "In 1943 there was a ceiling price placed upon bulk whiskey at which time Mr. Bruhn, who was then with the company, came to the witness and explained that the company owned about 340 barrels of bulk whiskey, and over night the OPA had put a ceiling on it and that J. C. Perry & Company had sustained a severe loss by the fixing of the ceiling price. Mr. Bruhn said the condition was critical and wanted to know what the witness thought about the matter. Later there was a discussion between the witness as president of the company and Mr. Robert Hare and Mr. Bruhn as managers of the liquor department. Mr. Bruhn and Mr. Robert Hare as managers of the liquor department said that by selling this liquor out of the state the company could avoid salesmen's commissions, some local freight or warehoues charges on it *and the witness gave his consent that this be done.*

"In answer to the Court the witness said that he was not acquainted with the whiskey department and could not tell the value of the whiskey. The witness supposed the whiskey would become more valuable as it aged; but as they owed the bank some money they decided *to take the loss and put their money to some other use.*

"In further answer to counsel, the witness stated that he had served on the OPA board in fixing prices in the grocery department. *In the discussion of the disposition of this whiskey the witness specifically directed that care be taken to have the ceiling price determined and sell only at the ceiling price.*

"Mr. Bruhn and Robert had charge of this whiskey department but did from time to time consult the witness about selling this whiskey. Some five or six weeks after witness consent was given to the sale in Ohio Mr. Rozelle came and said to the witness, 'John, you should never be sorry that Fred and Bob sold that whiskey in Ohio instead of sending it to Chicago or out west to California,' and I asked him what he meant and he said because they had sold it in Ohio, and he made arrangements with a man over there who was going to pay him a finder's fee. I asked him if that was permitted, and he said, 'Yes.' (He may not have used the term finder's fee but was going to pay Rozelle money for any whiskey he could get.) That the tav-

erns or package stores were willing to pay someone to find the whiskey for them. The witness says that he was not familiar with the operations and upon inquiry Mr. Rozelle further told him that he was going to get the money and was going to divide it four ways; that the witness asked him if this was legal, and he said: 'There is nothing wrong because finder's fees are being paid all the time.' At a later time the witness asked his brother Bob about finder's fees and was told there was nothing wrong with it. That it was all right *and the witness dismissed the question from his mind.*"

It is submitted that the above record diametrically opposes any inference that such discussion implies an agreement by John Hare to formulate or participate in an illegal venture. Your petitioner, John Hare, therefore offers the record cited by the government as his argument on this point.

That the above discussion, referred to by the government, is the only discussion even remotely connected with the alleged venture is further attested by the words of the government's prime witness, Rozelle, on redirect examination (R. 89) when he said: "There was never a time when he, Robert Hare, Clinton Hare and John Hare, were in a meeting concerning the division of this money and they were never all present when the matter was discussed."

As to the substantive counts, with respect to both of your petitioners, John Hare and Clinton LaRue Hare, these petitioners urge that the vague testimony presented by Rozelle during the government's case in chief, as presented in petitioners' brief (Pet. 19-21) was in and of itself insufficient to warrant sending the case to the jury, for the reasons set forth. After reading the brief in opposition, however, your petitioners, John Hare and Clinton LaRue Hare, now further argue that even conceding they received a share of proceeds from funds derived from illegal sales covered by the substantive counts, nevertheless, such mere receipt of the proceeds, after the transactions had been concluded and finished, when viewed in the light of the sur-

rounding circumstances, is insufficient in and of itself to warrant submission to the jury of the question on their guilt.

Under issues now so clearly drawn, it appears to petitioners that the case of *Bollenbach* v. *United States,* (No. 41, current docket), decided by this Court on January 28, 1946, exercises a controlling influence.

In that case, Bollenbach was charged with transporting securities in interstate commerce, knowing them to have been stolen, and for conspiring to commit that offense. In this case, your petitioners are charged with selling and delivering whiskey, knowing that the price at which the same was sold and delivered exceeded the lawful ceiling price therefor, and with conspiring to do the same.

In the Bollenbach case there was no doubt that the securities had been stolen in Minneapolis and were transported to New York. It was not controverted that Bollenbach helped to dispose of them in New York.

Upon the basis of Bollenbach's possession of the stolen securities in New York, the government sought to invoke the theory that the fact of his possession of the same was sufficient to permit a jury to infer that he knew the same had been stolen and that he had participated in the conspiracy to steal them.

This Court held that such mere possession was insufficient to create a presumption of knowledge of the theft or participation in the conspiracy.

In this case, in so far as your petitioners, John Hare and Clinton LaRue Hare are concerned, it is their acceptance of money derived from alleged illicit liquor sales, after such transactions had been fully completed, upon which the government relies for sustaining verdicts of guilty as to both sales and conspiracy.

Paraphrasing the words of this Court in the Bollenbach case, your petitioners, John Hare and Clinton LaRue Hare, here argue that the prime question now before this Court is "whether guilt has been found by a jury according to

the procedures and standards appropriate for criminal trials in the Federal courts."

The government, in its brief, brings this question into stark relief in these words (Gov't. Br. 6, 7): "*It was, however, clearly in the jury's province to infer* that these two defendants, who stated that they took no active part in the liquor department of the company, were not given one-fourth of the proceeds, amounting to more than $42,000, without an agreement making them parties to the venture."

If there had been an agreement, was not the same within the knowledge of Rozelle, the government's prime witness and the chief movant in both sales and conspiracy? Why did he remain mute on this point? He was the engineer of the transactions; he supplied testimony concerning many minute details with respect to them. When he is silent as to so salient a fact as the agreement of John and Clinton Hare to become partners with him in this venture, is not the conclusion inescapable that no such agreement ever existed? Does not Rozelle's failure here to speak out constitute a circumstance of negation precluding consideration of a pure speculation offered by the government, namely, that because two men accepted money from their brother, after assurances of its legality by both their brother and Rozelle, who had intimate knowledge concerning the subject matter, while they had none, there should be an inference raised (to the exclusion of inferences of innocence) of retroactive knowledge and participation in the then finished illegal transactions?

Your petitioners argue that since the one who knew most about the transactions was a government witness at the trial, it then and there became essential for the government to produce at least some substantial evidence that they agreed to the venture and participated in it before the case against them could properly have been submitted to the jury. At the very least, the government should have demonstrated the impossibility of producing such evidence. In the unexplained absence of such evidence within control

of the government, certainly the remedy for the fatal omission is not the suggestion that the jury's province extends to guesswork and speculation.

Rozelle's own words (R. 89) indicate that if he had been asked directly: "Did John Hare and Clinton LaRue Hare to your knowledge ever agree to a plan for selling whiskey in excess of ceiling prices?" his answer may well have been in the same words that appear in his redirect examination (R. 89): "They were never all present when the matter was discussed."

In closing, your petitioners respectfully draw again to the attention of this Court the words of the Tenth Circuit Court of Appeals in *Leslie* v. *United States,* 43 F. (2) 288, 290: "When the proof rests on circumstances which lead as rationally to the conclusion of innocence as of guilt, there is no proof of guilt and nothing to go to the jury. *Juries are not permitted to speculate in civil cases as to the negligence of the defendant; they should not be permitted to guess at the guilt of a defendant in a criminal case.*"

John Hare and Clinton Hare say that the government's proposition that it was in the jury's province "to infer the guilt of these defendants" and their agreement in an illegal venture from the fact that after the venture was all over they received some of the proceeds thereof from their brother is tantamount to a proposal that the jury be "permitted to guess" at their guilt.

(All italics in this brief have been supplied by us.)

Respectfully submitted,

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